Supreme Court, U.S.
FILED
04-887 SEP 8 - 2004
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Soeoth – Agustino, Raymond Gerald and Mumu Cindy

Petitioner

vs.

John Ashcroft, Attorney General of the United States

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO

Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. THE IJ, THE BOARD OF IMMIGRATION APPEALS ("BOARD"), AND THE NINTH CIRCUIT COURT OF APPEALS MISAPPLIED THE CRITERIA FOR ELIGIBILITY FOR ASYLUM AS STATED IN SECTION 101 (a)(42) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. §1101(A)(42). 8 U.S.C. §1101(A)(42) NOT ONLY PROTECTS INDIVIDUALS WHO HAVE FACED PERSECUTION IN THE PAST BUT THOSE WHO REASONABLY FEAR FUTURE PERSECUTION.

A. THE PETITIONERS HAVE A WELL-FOUNDED FEAR OF FUTURE PERSECUTION IN INDONESIA.

II. THE BOARD OF IMMIGRATION APPEALS ABUSED ITS DISCRETION IN DENYING PETITIONERS ASYLUM APPLICATION WHEN PETITIONERS DEMONSTRATED PAST PERSECUTION ON AT LEAST ONE ENUMERATED GROUND.

III. THE IJ AND BOARD'S FAILURE TO REBUT REGULATORY PRESUMPTION OF FUTURE PERSECUTION PREJUDICED PETITIONERS ASYLUM CLAIM.

IV. DUE PROCESS REQUIRES THE IMMIGRATION JUDGE TO: 1) ADHERE TO REGULATORY AND PROCEDURAL SAFEGUARDS; 2) TO ACT IMPARTIALLY; AND 3) TO FULLY AND FAIRLY DEVELOP THE RECORD

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

OPINIONS BELOW

The Immigration and Naturalization Service ("Service") now a part of the Bureau of Immigration and Customs Enforcement commenced Removal proceedings on May 8, 2000..

On February 2, 2001, Petitioners appeared before the Immigration Judge ("IJ") for a hearing on the merits of his application for relief of Asylum, Withholding of Removal, and Voluntary Departure in the alternative. The Immigration Judge denied Petitioners application for Asylum, Withholding of Removal, and relief under the Convention Against Torture, even though this relief was not specifically asked by Petitioners. However, the Immigration Judge granted Voluntary Departure as an alternative form of relief.

The IJ, in rendering his decision, repeatedly noted that Petitioners were credible. The IJ also confirmed the suffering of Christians in Indonesia. Nonetheless, the IJ found that Petitioners did not suffer past persecution, nor that they established a well-founded fear of persecution. The IJ's analysis cited an 11th Circuit case regarding the lapse of time between the occurrences of harm and entry into the United States.

Thereafter, Petitioners filed a timely Notice of Appeal with the Board of Immigration Appeals. On December 18, 2002, the Board of Immigration

Appeals affirmed the Immigration Judge's decision without opinion pursuant to 8 C.F.R. §3.1(e)(4) (now 8 C.F.R. §1003.1 (e)(7)). Consequently, Petitioners properly filed a Petition for Review with the United States Court of Appeals for the Ninth Circuit pursuant to Section 242 of the Immigration and Nationality Act ("I.N.A."), 8 U.S.C. §1252(b)(2).

On June 14, 2004, the United States Court of Appeals for the Ninth Circuit denied the Petition for Review.

In denying the Petition for Review, the Federal Circuit Court noted that "[s]ubstantial evidence supports the finding of the IJ that the petitioners failed to establish sufficient individualized harm or risk of future harm as members of Indonesia's Christian minority to be eligible for asylum on the basis of past persecution or a well-founded fear of future persecution at the hands of factions within the Muslim majority..." as interpreted in Mgoian v. INS, 184 .3D 1029, 1035 n.4 (9th Cir. 1999) The Ninth Circuit Court of Appeals further noted that the petitioners necessarily failed to meet the more stringent evidentiary standard required for Withholding of Removal, and relief under Convention Against Torture is reviewed for substantial evidence. Fisher v. INS, 79 F.3d 955, 961(9th Cir. 1996) (en banc).

JURISDICTION

[x] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was June 14, 2004.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Immigration and Nationality Act §208, codified at 8U.S.C. §1158. in its entirety and verbatim provides:
Section 208, 8 U.S.C. 1158

STATEMENT OF THE CASE

Mumu Cindy Soeth and Raymond Gerald A. Soeth ("Petitioners") are husband and wife, native and citizen of Indonesia. They last entered the United States pursuant to a grant of Tourist visa on February 4, 1999. Petitioners filed for relief of Asylum, Withholding of Removal and Convention Against torture ("CAT") on March 22, 2000. Although the application was filed in excess of one year after entry in to the United States, the Immigration and Naturalization Service ("Service") now a part of the Bureau of Immigration and Customs Enforcement accepted the application as timely. Petitioners were placed in removal proceedings on May 8, 2000. On February 2, 2001, Petitioners appeared before the Immigration Judge ("IJ") for a hearing on the merits of his application for relief of Asylum, Withholding of Removal, Convention Against Torture ("CAT"), and Voluntary Departure in the alternative.

Mr. Soeth ("Male Petitioner"), during his testimony, and in accordance with his asylum application, established that he has been a Christian since childhood; his baptism occurred on June 21, 1987. Mr. Soeth, indicated that he had problems since his school days partly due to his religion and partly to his light, Chinese-like complexion. In his testimony, he indicated about one specific incident that occurred in August of 1988.

While on his way to church, five Muslim men stopped him and interrogated him, inquired whether he was Chinese and he answered in the negative. Then they asked him whether h was a Christian and when he said yes, they proceeded to hit him.

Petitioners were married on December 12, 1998, in the Pentecostal churches temporary facility following the burnings of the church in September 1998 by a group of Muslim leaving behind only charred frame. These Muslim groups apparently burned approximately eight other churches including the Pentecostal church Mr. Soeth was attending.

Mrs. Soeth ("Female Petitioner") was limited, in her testimony to problems she suffered because of Christianity in the five years preceding her entry to the United States. She testified that after her arrival to the United States, a bomb was placed in the church she always attended killing two people.

Petitioners both testified that when as children they went to church, they were harassed or badgered by Muslims who denigrated their religious belief.

The Immigration Judge denied Petitioners application for Asylum, Withholding of Removal, and relief under the Convention Against Torture.

However, the Immigration Judge granted Voluntary Departure as an alternative form of relief.

Thereafter, Petitioners filed a timely Notice of Appeal with the Board of Immigration Appeals. On December 18, 2002, the Board of Immigration Appeals affirmed the Immigration Judge's decision without opinion pursuant to 8 C.F.R. §3.1(e)(4) (now 8 C.F.R. §1003.1 (e)(7)). Petitioners properly filed a Petition for Review with the United States Court of Appeals for the Ninth Circuit.

On June 14, 2004, the United States Court of Appeals for the Ninth Circuit denied the Petition for Review.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

This case presents important issues regarding the powers of Administrative Courts such as the Executive Office of Immigration Review and the Board of Immigration Appeals. Also, this case represents the powers and duties of federal courts in reviewing constitutional and statutory violations and misapplications of the law by administrative agencies.

The improper interpretation of Immigration and Nationality Act §101(a)(42), codified at 8 U.S.C. §1101(a)(42) by the Ninth Circuit Court of Appeals and by the administrative agency, affects numerous similarly situated individuals whom their lives are in danger if returned to the country they are seeking protection from.

I. THE IJ, THE BOARD OF IMMIGRATION APPEALS ("BOARD"), AND THE NINTH CIRCUIT COURT OF APPEALS MISAPPLIED THE CRITERIA FOR ELIGIBILITY FOR ASYLUM AS STATED IN SECTION 101 (a)(42) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. §1101(A)(42). 8 U.S.C. §1101(A)(42) NOT ONLY PROTECTS INDIVIDUALS WHO HAVE FACED PERSECUTION IN THE PAST BUT THOSE WHO REASONABLY FEAR FUTURE PERSECUTION.

A. THE PETITIONERS HAVE A WELL-FOUNDED FEAR OF FUTURE PERSECUTION IN INDONESIA.

In the instant case, the IJ, Board, and the Court of Appeals for the Ninth Circuit failed to make independent and distinct findings about

Petitioners' fear of future persecution independent of any past persecution they might have suffered.

Section 208 of the Immigration and Nationality Act, codified at 8 §U.S.C. 1158(a), authorizes the Attorney General, in his discretion, to grant asylum to an alien who is a "refugee" as defined in Section 101(a)(42) of the Act. INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992).

Section 101 (a)(42) of the Act, codified at 8 U.S.C. §1101(a)(42)(A)defines a "refugee" as an alien who is unable or unwilling to return to his home country "because of persecution *or* a well founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion". I.N.A. §101(a(42)(A), 8 U.S.C. §1101(a)(42)(A).

The plain meaning of the term "or" in Section 101(a)(42) of the Immigration and Nationality Act signifies Congressional intent to protect individuals whom were persecuted in the past as well as individuals who fear future persecution.

"Past persecution and a well-founded fear of future persecution provide separate avenues for establishing eligibility for asylum." Lopez-Galarza v. INS, 99 F.3d 954, 958 (9th Cir.1996) (citing Kzauskas v. INS, 46 F.3d 902, 905 (9th Cir. 1995) (citing Acewicz v. INS, 984 F.2d 1056, 1061-

62 (9th Cir. 1993); Berroteran-Melendez v. INS, 955 F.2d 1251, 1255 (9th Cir. 1992) (citing Desir v. Ilchert, 840 F.2d 723, 726 (9th Cir. 1988)).

The term "or" has been defined to connote "[a] disjunctive particle used to express an alternative or to give a choice of one among two or more things." Black's Law Dictionary 1990. A federal statute is interpreted by ascertaining the intent of Congress and by giving effect to its legislative will". Hernandez v. Ashcroft, 345 F.3d 824, 838 (9th Cir.2003)

However, deference to the agency's interpretation of immigration laws is only appropriate if Congress' intent is *unclear*. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984); INS v. Cardoza-Fonesca, 480 U.S. 421, 446 (1987)) (using traditional tools of statutory construction to determine the meaning of "final determination" and holding that deference is not required); INS v. St. Cyr, 533 U.S. 289, 320 n. 45 (2001) ("we only defer ... to agency interpretations of statutes that, applying the normal tools of statutory construction, are *ambiguous*.") (emphasis added).

The IJ simply failed to analyze and consider all relevant factors including whether the country conditions merits inquiry into future persecution as mandated by the statute, even if the IJ found evidence of past persecution debatable at the time. Therefore, the Boards decision

compounded the IJ's error by not independently establishing a well-founded fear of future persecution.

The Board's determination that Petitioners are not eligible for asylum must be upheld if "supported by reasonable, substantial, and probative evidence on the record considered as a whole." INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992) (citing 8 U.S.C. §1105a(a)(4)); Lim v. INS, 224 F.3d 929 (9th Cir. 2000); Castillo v. INS, 951 F.2d 1117, 1120 (9th Cir. 1991).

The Board's denial of an asylum claim will be reversed only if the evidence presented was such that a reasonable fact finder would have to conclude that the requisite fear of persecution existed. INS v. Elias-Zacarias, 502 U.S. at 482, (citing NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292 (1939)); Ramos-Vasquez v. INS, 57 F.3d 857, 861 (9th Cir. 1995)(The BIA's determination of eligibility for asylum is reviewed by substantial evidence); Lim v. INS, 224 F.3d 929 (9th Cir. 2000); Alaelua v. INS, 45 F.3d 1379, 1381-82 (9th Cir. 1995) (When the BIA clearly incorporates the IJ's decision and fails to perform an independent review of the record, we review the IJ's decision).

The Board has the power to make its own findings of fact especially when the IJ never made any such findings. Cardoza-Fonesca v. INS, 767 F.2d 1448, 1455 (9th Cir. 1985), aff'd, 480 U.S. 421 (1987). However, the

Board, pursuant to 8 C.F.R. §3.1(e)(4), solely affirmed, without opinion, the administrative judge's decision.

Given the crucial issue presented in the instant matter, Board's failure to make an individualized determination amounts to an abuse of discretion. Rodriguez Matamoros v. INS, 86 F.3d 158, 161 (9th Cir. 1996)

The plain reading of § 101(a)(42) of the Immigration and Nationality Act, 8 U.S.C 1101 § (a)(42) not only protects persons who experienced persecution in the past but also protects those who reasonably fear persecution if returned to their country.

"Persecution" for eligibility for asylum is defined as infliction of suffering or harm upon those who differ in race, religion or political opinion in a way regarded as offensive. Lopez-Galarza v. INS, 99 F.3d 954 (9th Cir.1996).

Well-founded fear of persecution is defined as a fear that is both subjectively genuine and objectively reasonable. Prasad v. INS, 47 F.3d 336, 338 (9th Cir. 1995); Singh v. INS, 134 F.3d 962, 966 (9th Cir.1998); Hernandez-Ortiz v. INS, 777 F.2d 509, 517 (9th Cir.1985).

The subjective element of well-founded fear may be satisfied by *credible testimony* that the applicant genuinely fears persecution. Prasad v. INS, 47 F.3d at 338 (citing Acewicz v. INS, 984 F.2d at1061) (emphasis

added). Petitioners' credible, unassailable testimony establishes the requisite subjective fear necessary for entitlement to political asylum. See Salazar-Paucar v. INS, 290 F.3d 964, 971 (9th Cir. 2002) (quoting Kataria v. INS, 232 F.3d 1107, 1114 (9th Cir. 2000)); Diaz-Escobar v, INS, 782 F.2d 1488, 1492 (9th Cir. 1986) ("What is critical is that the alien prove his fear is subjectively genuine and objectively reasonable."); Gomez v. INS, 947 F.2d 660, 663 (2d Cir. 1991) ("An alien may satisfy the subjective prong by showing that events in the country to which he or she will be deported have personally or directly affected him or her." (citation omitted))

The objective element requires "a showing by credible, direct, and specific evidence of fact that would support a reasonable fear of persecution on relevant ground". Prasad v. INS, 47 F.3d at 338 (citation omitted).

The Country Report on Human Rights Practices ("Country Report") by United States Department of State, Bureau of Democracy, Human Right and Labor (2000) for Indonesia was submitted into evidence. The Country Report supports the high probability of persecution of Petitioners due to their religious affiliations and practices. As the Country Report indicates, the persecutor's had the ability and desire to punish individuals based on their religious affiliations and/or ethnicity. Zacarias v. INS, 921 F.2d 844, 850 (9th Cir. 1990) (in determining likelihood that alien will be persecuted, "we

examine the guerrillas' will or ability to carry out the threat, not simply whether the threats were made"), rev'd on other grounds, 502 U.S. 478 (1992). The persecutor's motive is further evident by its treatment of other similarly situated Christians in Indonesia. The Country Reports credible evidence of religiously-motivated hate crimes against Christians is compelling evidence that Petitioners lives are in danger by reason of their own religious affiliations. Gomez-Saballos v. INS, 79 F.3d 912, 916 (9th Cir. 1996).

The Country Report states in pertinent parts that:

> "According to multiple sources, over 3,000 persons were killed, largely because of their *religious identity,* in North Maluku, Maluku, and Central Sulawesi provinces in the eastern part of the country. The fighting in all three provinces had political, economic, ethnic, and religious overtones. While initial conflict emerged over land tenure issues and the political and economic status of local residents versus migrants, in many cases the conflict later evolved into highly *charged religious clashes. One of the major factors contributing to the continuation of violence in these islands was the failure to bring the perpetrators to justice* (see Section 2.c. and 5); another factor was the *failure of*

authorities to prevent armed militants from traveling in large groups to the Muluccas from Java...Religious violence and the l*ack of an effective government response to punish perpetrators and prevent* further attacks led to allegations that officials were complicit in some of the incidents or, at a minimum, allowed them to occur with impunity. There were numerous instances of attacks on churches, mosques, temples, and other religious facilities during the year (see Section 1.a. and 5). The most widespread antireligious violence occurred in Muluccas, where well over 100 houses of worship were damaged and destroyed and thousands of persons were killed as Christians and Muslims engaged in mutually-destructive violence...In North Maluku and Maluku province, Christian sources allege that elements of *the security forces were biased* against them. For example, predominantely Muslim unit dispatched from Java and Sulawesi allegedly sided with *Muslim Vigilantes* and used excessive force against Christians... The Government formed a special interagency team to investigate the December 24 bombing on Christian churches, and an NGO has formed a joint fact-finding team with the Government to investigate the Christmas Eve church bombings

(see Section 1.a., 1.c., and 5). According to many Christian officials, the anti-Christian sentiments behind the violence in the Moluccas, Sulawesi, and elsewhere is not new, but the impunity associated with such acts is. *They claim that such impunity has contributed significantly to the attacks that have occurred since Soeharto resigned in May 1998.* The Government did not investigate fully most cases of attacks on religious facilities that occurred during the riots, and in other cases, did not investigate such incidents at all...Closures and *attacks on churches*, temples, and other religious facilities, ranging from minor vandalism to arson increased during the year, according to the Indonesian Christian Communications Forum (IFCC). The IFCC *recorded 122 religiously-motivated* attacks on Christian churches or other Christian facilities during the year....The *Government failed to suppress or respond to most cases of violence and did not resolve fully the many cases of attacks on religious facilities and churches that occurred during the riots; in other cases, the Government did not investigate such incidents at all.* Anti-Christian sermons and publications also increased, leading to concerns that societal support for religious tolerance were eroding. In the early part of

the year, a movement known as the Islamic State of Indonesia (NII) emerged on university campuses in Java. There were sporadic reports from some neighborhoods of Jakarta that student followers of *the NII movement set up roadblocks, checked identification cards and harasses passing non-Muslims, in some cases forcing them to recite passages from the Koran.....* The Laskar Jihad("holy war troops"), another Muslim group that was formed during the year, engaged in paramilitary training, and the leaders of the group announced that they were planning to wage war on Christians in Moluccas. The Government closed a conspicuous Laskar Jihad training camp south of Jakarta, but otherwise was *reluctant to challenge the organization openly.* Many of its recruits, some of whom were children (see Section 6.d.), ..." (emphasis added) Country Report on Human Rights Practices by United States Department of State, Bureau of Democracy, Human Right and Labor (2000)

This Court has previously indicated that even a 10% chance of death may give rise to a well-founded fear. INS v. Cardoza-Fonesca, 480 U.S. 421, 431(1987); Velarde v. INS, 140 F.3d 1305, 1310 (9th Cir. 1998) ("[W]e recently clarified that a 'one in ten chance' is sufficient.", (citing Monticito

v. INS, 915 F.2d 518, 520 (9th Cir. 1990)); Chang v. INS, 119 F.3d 1055, 1066 (3rd Cir. 1997); Cuadras v. INS, 910 F.2d 567 (9th Cir. 1990) ("Reasonable person" test set forth in Mogharrabi is not inconsistent with Ninth Circuit's two-pronged [subjective and objective component] formulation of the well-founded fear test in Cardoza-Fonesca,) (citing Guevara Flores v. INS, 786 F.2d 1242, 1249 (5th Cir. 1986), cert denied, 480 U.S. 930 (1987)); Matter of Mogharrabi, 19 I&N Dec. 439, 445 (BIA 1987) ("Well-founded fear shown if a *reasonable person* in alien's circumstances would fear persecution") (emphasis added); Enager v. INS, 930 F.2d 784, 799 (9th Cir. 1991) ("'A well-founded fear can exist where there is a less than 50% chance of persecution.)

Hence, in light of the country report, Petitioners have established that their subjective fear is reasonably objective. The Country report presents ample and specific facts showing a pattern of religious persecution by the Indonesian Government or groups the Indonesian Government is unwilling or unable to control. There exists a reasonable possibility that, aside from the Indonesian government, the supporters of the Muslim majority, as emphasized in the Country Report, commit persecution when they are certain the Government is unwilling to prosecute. In Montoya-Ulloa v. INS, the Court of Appeals for the Ninth Circuit emphasized that "[f]or the

purpose of defining persecution under the Immigration and Nationality Act, there is no distinction between the direct actions of the government and the actions of a group that is recognized and sponsored by the government." Montoya-Ulloa v. INS, 79 F.3d 930, 931 n.1 (9th Cir. 1996)

The Petitioners' testimonies were consistent with the asylum application, and substantial background information and Country Report in the record.

Reports supplied by the Department of State are the " 'most appropriate and best source for information on political situation in foreign nations'." Marcu V. INS, 147 F.3d 1078, 1081 (9TH Cir. 1998), cert denied, 119 S. Ct. 1496 (1999); See Rodriguez-Matamoros v. INS, 86 F.3d 156, 160 n.2 (9th Cir. 1996) ("Rodriguez also contends that she had a well founded fear of future persecution, but we agree with BIA that, in light of the *changed political climate* in Nicaragua, she does not." (citation omitted)) (emphasis added); Zavala Bonilla v. INS, 730 F.2d 562, 564 (9th Cir. 1984) ("[G]eneral information concerning oppressive conditions is relevant to support specific information to an individual's well-founded fear of persecution" (citation omitted); Vaduva v. INS, 131 F.3d 689, 691 (7th Cir. 1997) ("It was reasonable for the Board to place weight on a report issued by an expert in the field, which the State Department is, even if the Department has a

'tendency to downplay human-rights violations by governments with which the United States wants to have friendly relations.'" Gramatikov v. INS, 128 F.3d 619, 620 (7th Cir. 1997).").

The totality of circumstances compels and requires a finding by this Honorable Court that Petitioners have a well-founded fear of persecution when purely religiously and ethnically directed incidents occurred to them because of the general atmosphere created by the Indonesian government.

II. THE BOARD OF IMMIGRATION APPEALS ABUSED ITS DISCRETION IN DENYING PETITIONERS ASYLUM APPLICATION WHEN PETITIONERS DEMONSTRATED PAST PERSECUTION ON AT LEAST ONE ENUMERATED GROUND.

Eligibility for asylum "may be based on past persecution alone." Acewiz v. INS, 984 F.2d 1056, 1062 (9th Cir. 1993) Even absent a well-founded fear of future persecution. Desire v. Ilchert, 840 F.2d 723, 729 (9th Cir. 1988).

Persecution has been interpreted to mean "the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive. Ghaly v. INS, 58 F.3d 1425, 1431 (9th Cir. 1993).

"The key question is whether, looking at the cumulative effect of all the incidents petitioner has suffered, the treatment she received rises to the level of persecution". Singh v. INS, 134 F.3d 962, 967 (9th Cir. 1998)

Well-founded fear of persecution is defined as a fear that is both "subjectively genuine" and "objectively reasonable". Prasad v. INS, 47 F.3d 336, 338 (9th Cir. 1995); Singh v. INS, 134 F.3d 962, 966 (9th Cir.1998); Hernandez-Ortiz v. INS, 777 F.2d 509, 517 (9th Cir.1985). The subjective component may be satisfied by the applicant's testimony. Id. An applicant's testimony must be accepted as true if "the petitioner is found to be credible or there is no specific adverse finding of credibility. Kataria v. INS, 232 F.3d 1107, 114 (9th Cir. 2000). Objective fear of persecution can be established in two ways. Firstly, if an applicant establishes past persecution, it triggers a rebuttable presumption of a well-founded fear of future persecution. 8 C.F.R § 208.13(b)(1)(i); Reyes-Guerrero v. INS, 192 F.3d 1241, 1244-45 (9th Cir. 1999) The government can then rebut this presumption by *preponderance of evidence* that there has been a *fundamental change* in circumstances such that the applicant no longer has a well-founded fear. 8 C.F.R § 208.13(b)(1)(i)(emphasis added); Reyes-Guerrero v. INS, 192 F.3d at 1245 (9th Cir. 1999) "Second, an applicant can show a good reason to fear future persecution by adducing credible, direct, and specific evidence in the record of facts that would support a reasonable fear of persecution with either direct testimony or documentary evidence. Duarte de Guinac v. INS, 179 F.3d 1156, 1159 (9th Cir. 1999). Such

evidence need only establish a "reasonable probability" of persecution. Cardoza-Fonesca, 480 U.S. 421, 431 (1987) (Court indicating that even a 10% chance of death may give rise to a well-founded fear); Enager v. INS, 930 F.2d 784, 799 (9th Cir. 1991) ("'A well-founded fear can exist where there is a less than 50% chance of persecution.").") *accord* Velarde v. INS, 140 F.3d 1305, 1310 (9th Cir. 1998) ("[W]e recently clarified that a 'one in ten chance' is sufficient.", citing Monticito v. INS, 915 F.2d 518, 520 (9th Cir. 1990); Chang v. INS, 119 F.3d 1055, 1066 (3rd Cir. 1997).

Petitioners' testimony and asylum application indicates repeated instances of religiously and racially motivated harm throughout their lives. The record contains proof of incidents occurring to the Petitioners while in Indonesia and incidents occurring after their arrival to the United States targeted on individuals based on their religious affiliations. The male Petitioner has been a Christian since childhood. He testified that he had problems because of his religion since his school days. Specifically, Muslims prevented him from attending church and mocked him. On several occasions he was beaten while yielding a Bible on a public bus on his way to school. One of these beating left a scar on the back of his head. The male Petitioner's declaration, in chorological order, begins with the destruction of his church in 1998. The declaration further states that Petitioners were stopped on

December 1, 1998 and threatened with death by five individuals seeking to know if they were Chinese.

Additionally, during the proceeding, the IJ found both Petitioners to be sincere, candid, and found their testimony was reliable and credible. "Immigration judges credibility findings are entitled to considerable deference on appeal from the decisions of the Board of Immigration Appeals." Hartooni v. INS, 21 F.3d 336 (9th Cir. 1994); Canjura-Flores v. INS, 784 F.2d 885, 889 (9th Cir. 1985) ("The immigration judge is in the best position to make credibility findings because he sees the witness as the testimony is given").

However, the IJ's reasoning was internally inconsistent. The IJ determined that even though credible, Petitioners had not suffered past persecution despite a direct physical attack on the male petitioner in 1988 and burning of their churches in 2000. Citing out of Circuit precedent, the IJ based his determination of past persecution solely on the fact that too much time had elapsed between attacks on the male Petitioner and his departure to the United States. Also, the IJ gave insufficient weight to the fact that the male Petitioner's parents were returning to Indonesia after their brief visit to the United States. However, some courts have held that even one incident of an arrest of a family member at a church may provide the basis for past

persecution of petitioners family on account of religion. Li v. INS, 92 F.3d 985, 987 (9th Cir. 1996).

Therefore, in light of the precedent decisions in the Ninth Circuit, the IJ finding that Petitioners' instances of abuse did not rise to level of past persecution was unreasonable. Nasseri v. Moschorak, 34 F.3d 723, 729 (9th Cir. 1994) ("Crucial to a determination of the probability of persecution is 'whether the group making the threat has the will or the ability to carry it out.' Nasseri's case is unusually strong because the threat of future persecution here is rooted in numerous incidents of actual past persecution. The Amnesty International Report and the State Department report indicate that the mujahidine continue to detain and torture individuals, such as Nasseri, who they believe are political enemies." (citation omitted)), overruled in part by Fisher v. INS, 79 F.3d 955, 963 (9th Cir. 1996)(en banc). The Petitioners, also testified that they further suffered harm because their persecutors imputed upon them, based on the color of their skin, that they were of Chinese decent.

Federal courts have all recognized the doctrine of imputed [political opinion] in asylum cases. This doctrine would similarly apply to imputed ethnicity just as well. 'An imputed political opinion, whether correctly or incorrectly attributed, may constitute a reason for political persecution

within the meaning of the Act." Gomez-Saballos v. INS, 79 F.3d 912, 917 (9th Cir. 1997); Canas-Segova v. INS, 970 F.2d 599, 601 (9th Cir. 1992); Singh v. Ilchert, 63 F.3d 1501 (9th Cir. 1995); Vasquez v. INS, 177 F.3d 62, 65 (1st Cir. 1999) (quoting Ravindran v. INS, 976 F.2d 754, 760 (1st Cir. 1992)). "An imputed political opinion is a political opinion attributed to the applicant by his persecutors." Sangha v. INS, 103 F.3d 1482, 1489 (9th Cir. 1997). The focus then becomes what the persecutors believe is the particular political opinion of the Petitioner and not what the Petitioner's actual belief. Id.

Hence, preferred testimonial evidence and Country Report viewed as a whole compels the inescapable conclusion that the harm inflicted on persecutors is on basis of Petitioners' religious affiliations.

III. THE IJ AND BOARD'S FAILURE TO REBUT REGULATORY PRESUMPTION OF FUTURE PERSECUTION PREJUDICED PETITIONERS ASYLUM CLAIM.

If applicant establishes past persecution, the applicant is presumed to have well-founded fear of future persecution. 8 C.F.R. §208.13(b)(1)(i)(2000); Borja v. INS, 175 F.3d 732, 738 (9th Cir. 1999) (en banc); Garrovillas v. INS, 156 F.3d 1010 (9th Cir. 1998); Velarde v. INS, 140 F.3d 1305, 1310 n.4 (9th Cir. 1998).

If this Honorable Court should find that the Board erred as matter of law and that Petitioners have established, through the IJ's findings of credibility, that they suffered past persecution based on an enumerated ground, then the burden shifts to the government to present evidence that there is little likelihood of present persecution. Matter of Chen, 20 I&N Dec. 16, 18 (BIA 1989).

This regulatory presumption may be rebutted only by showing, by a preponderance of the evidence that since the time persecution occurred, conditions in the applicant's country have changed to such an extent that the applicant no longer has a well-founded fear of persecution if returned to his country. 8 C.F.R. §208.13(b)(1)(i); Matter of N-M-A-, Interim Decision 3368, at 3 (BIA 1998) ('We hold that 8 C.F.R. §208.13(b)(1)(i) (1998) sets forth an evidentiary presumption and that the presumption is extinguished changed conditions in the applicant's country revealing that a particular threat, while led to the past harm, no longer exists. Accordingly, once an applicant has demonstrated that he has suffered past persecution on account of statutory-protected grounds, and the record reflects that country conditions have changed to such an extent that the applicant no longer has a well-founded fear of persecution from his original persecutors, the applicant

bears the burden of demonstrating that he has a well-founded fear of persecution from any new source.")

Here, the only other evidence in the record, to wit, the Country Report, further supports Petitioners' well-founded fear of persecution based on one of the statutory grounds. Neither the IJ nor the Service proffered evidence to rebut the regulatory presumption of well-founded fear of future persecution. Hence, the Service failed to meet its burden.

Case law further suggests that the IJ/BIA may take administrative notice of circumstances that substantiate likelihood of future persecution if Petitioners were to return. Kazlauskas v. INS, 46 F.3d 902, 906 n.3 (9th Cir. 1995) ("Fundamental social or political changes in the applicant's homeland are highly relevant to the likelihood of future persecution"); Hernandez-Oritz v. INS, 777 F.2d 509, 513 (9th Cir. 1985) (noting, in context of determining eligibility for asylum, that conditions in country of origin are relevant to likelihood of persecution): Matter of Chen, 20 I&N Dec. 16, 18 (BIA 1989).

Hence, the Country Report on Human Right Practices furnished by the Department of State further corroborates and gives weight to the testimonies of Petitioners regarding their fear for returning to Indonesia. Nothing in the record indicates changed condition with regards to treatment

of Petitioners based on their religious affiliations. In current years, the Country Report on Indonesia conveys increased incidents of religious persecution and attacks on Christian minorities among a country populated 85% by Muslims.

IV. DUE PROCESS REQUIRES THE IMMIGRATION JUDGE TO: 1) ADHERE TO REGULATORY AND PROCEDURAL SAFEGUARDS; 2) TO ACT IMPARTIALLY; AND 3) TO FULLY AND FAIRLY DEVELOP THE RECORD

Due process requires that an alien receive a full and fair hearing. Campos-Sanchez v. INS, 164 F.3d 448,450 (9th Cir.1999). In addition to Constitutional protections, there are statutory and regulatory safeguards as well. Barraza Rivera v. INS, 913 F.2d 1443, 1447 (9th Cir. 1990). The concept of fundamental fairness includes the right to an impartial decision maker. Goldberg v. Kelly, 397 U.S. 254, 271 (1970); Rose v. Clark, 478 U.S. 570, 577-78 (1986) (Impartiality of the judge goes to fundamental fairness of a trial)

Additionally, due process challenge to deportation requires a showing of prejudice to succeed.'" Id. at 1035 (citing Rodriguez-Lariz v. INS, 282 F.3d at 1226).

Individuals in deportation proceedings are entitled to present personal testimony. Jacinto v. Ashcroft, 208 F.3d 725, 728 (9th Cir. 2004) (citing 8 C.F.R. § 240.10(a)(4) (respondent has a reasonable opportunity to present evidence in his or her behalf); 8 U.S.C. § 1229a(b)(1)[1] (immigration judge *shall* receive evidence)) (emphasis added).

First, the Immigration Judge failed to adhere to regulatory and procedural safeguards. Second the Immigration Judge failed to act as an impartial fact finder by denying the Petitioner a reasonable opportunity to present his case. The Immigration Judge failed to adhere to regulatory and procedural safeguard. This failure compromised the fundamental fairness of the Petitioner's hearing before the Immigration Judge. "Prejudice occurs when the right of the alien have been transgressed in such a way as is likely to impact the results of the proceedings. Jacinto v. INS, 208 F.3d 725, 728 (9th Cir. 2004)(citing Campos-Sanchez, 164 F.3d at 450). Hence, it was an abuse of discretion by the Board to deny the motion to remand.

As a neutral fact finder, the Immigration Judge has a duty to hear all evidence prior to making a determination. The IJ's sharp critical remarks, limiting the testimony to a few years prior to Petitioners' departure from Indonesia, not giving an opportunity to correct accidental mistakes,

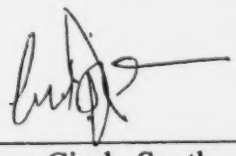
[1] The Immigration and Nationality Act § 240, 8 U.S.C. § 1229a(b)(1), in pertinent part provide that: "The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses ....."

unnecessary interruptions during direct examination, which at times rose to the level of intimidation, collectively and individually denied the Petitioners a reasonable opportunity to present their case in violation of Constitutional, statutory, and regulatory safeguards.

V. CONCLUSION

The totality of circumstances compels and requires a finding by this Honorable Court that Petitioners suffered past persecution and have a well-founded fear of persecution when ample evidence shows that the Indonesian government has consistently harmed, harassed individuals based on their religious opinions and affiliation with Christianity.

Respectfully Submitted,



Mumu Cindy Soeth

Date: 12/13/24